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Supreme Court, U.S.
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No. 86-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

vs.

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS, INC.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the union-appointed Trustees of a jointly-administered trust fund commence a suit under §502 and §515 of ERISA, when a deadlock exists, between the union-appointed Trustees and the employer-appointed Trustees as to the propriety of bringing suit, without complying with the deadlock provisions in the Declaration of Trust, which governs the Trustees actions?

2. Does a participant in an employee-benefit trust fund, who is not a fiduciary, have a right to bring an action to collect alleged delinquent contributions owed to the fund pursuant

to 29 U.S.C. §1132 prior to a finding that there has been a breach of fiduciary duty on the part of the Trustees where the claim is not a personal claim to the participant, nor does it deal with the provisions of the Fund?

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STATEMENT OF THE CASE

In or about June, 1984 discussion among the Trustees of Tapers Local Union 1974 Insurance and Annuity Funds was had regarding bringing suit against the respondent-employers. After reviewing the evidence presented by the union-appointed Trustees (Petitioners), in support of commencing an action, the three management appointed Trustees disagreed, and decided that it would not be proper to commence a lawsuit at this time. Therefore, the Trustees were deadlocked on this issue.

The Trustees are Trustees of two separate fringe benefit funds: 1) Tapers Industry Insurance Fund, and; 2) Tapers Industry Annuity Fund. While the two Funds were created pursuant to two separate Declarations of Trust, their

provisions with regard to actions by the Trustees are identical.

The Trusts were created under the mandate of 29 U.S.C. §186(c) and are required to be administered by an equal number of union and employer representatives. Article VII, Section 5, of each Trust provides that all actions by Trustees must be by majority decision. It also provides, that if a matter cannot be decided because of a tie vote, or a deadlock, the matter must be submitted to arbitration, as set forth in Article VIII of the Declarations.

However, when the Trustees tied on the issue of whether or not to commence a lawsuit, the subject matter of these appeals, the union-appointed Trustees did not resort to arbitration as per Article VII, section 5 and

Article VIII. The union-appointed Trustees commenced actions against two of the employers and named the employer appointed Trustees as defendants. These two lawsuits were designated, Alfarone, et.al., vs. Bernie Wolff, et. al., 84 Civ. 4028 and, Alfarone, et. al. vs. Component Assembly, Inc., et. al., 84 Civ. 4029.

On or about June 17, 1985, Petitioner, DANIEL JONES, sent a letter to the Trustees, requesting that they commence suit against another employer, NASTASI-WHITE, INC., to collect contributions which he believed were due and owing to the Funds. Counsel for the employer-appointed trustees, notified petitioner JONES, by letter, that they would need additional information to aid them in their decision and that if Petitioner JONES had such information,

he should feel free to submit it. However, no information was ever forthcoming. Therefore, there was never a refusal by the employer-appointed trustees to commence a lawsuit against the employer.

However, on August 5, 1985, petitioner JONES, filed a lawsuit against the employer and the employer-appointed trustees. This suit is named, Daniel Jones, et. al. vs. Nastasi-White, Inc., et. al., 85 Civ. 2908.

On May 30, 1985, the Honorable Eugene H. Nickerson, rendered and filed a decision in a fourth companion case, Alfarone, et. al., vs Nastasi-White, Inc., et. al., 84 Civ. 3181. This action was dismissed on the ground that the plaintiffs had no standing to sue and on the additional ground that no

contributions were due and owing. Based upon the authority of Alfarone vs. Nastasi-White, Inc., Judge Nickerson dismissed the complaint in the three cases now on appeal. The Jones case was dismissed on the additional ground that Jones had no standing to bring his suit.

Petitioners then appealed the decisions of Judge Nickerson to the United States Court of Appeals for the Second Circuit. After argument by all sides the decisions below were affirmed in a decision dated April 14, 1986. The decision was affirmed on three separate and distinct grounds:

1. The kind of work which these employees performed was not within the jurisdiction of the Tapers Union, as determined in, Drywall Tapers and Pointers vs. Operative Plasterer's Association and therefore no contributions were due; and,

2. The Trustees have not exhausted their administrative remedies and therefore the actions were premature; and,

3. A third lawsuit which was commenced by a beneficiary of the Funds was also properly dismissed.

Petitioners then petitioned the Second Circuit Court of Appeals, for rehearing with a suggestion that it be reheard enbanc. On May 22, 1986, the Second Circuit denied this petition.

Petitioners now seek certiorari by the Supreme Court of the United States. For the reasons set forth below, the Court should deny the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

POINT I

No conflict exists between the second circuit's decision below; the third circuit's decision in, Barrowclough v. Kidder, Peabody & Co., Inc., 752 F2d 924 (3d Cir. 1985) and the ninth circuits decision in Amaro v. Continental Can Co., 724 F2d 747 (9th Cir. 1984) with respect to the union-appointed trustees standing to sue without the Employer-Trustees joining. Both Barrowclough, and Amaro, supra, involve situations where an individual commenced an action for benefits which were due to him personally. Therefore, the holdings in both cases, upheld the individual's right to commence an action, pursuant to ERISA, 29 U.S.C.

§1132, without first proceeding to arbitration.

In the case at bar, we are dealing with union-appointed trustees right to commence suit before it has been determined that an employer owes contributions to the funds. There are no personal rights involved.

Additionally, in Barrowclough, supra the fund was not subject to the restrictions of 29 U.S.C. §186(c)(5)(B), since it was an independent fund, not set up in conjunction with a labor organization. Therefore, the fund trustees would not have been subject to the arbitration provisions mandated in 29 U.S.C. §186(C)(5)(B).

The holdings in the above cases, as well as other cases cited to by petitioners, dealing with suits by individuals, have no relation to the

case at bar. So, there is no conflict between the circuits on this issue.

POINT II

No conflict exists between the second circuit's decision below, and the third circuit's decision in, Nedd v. United Mine Workers, 556 F2d 190 (1977) and Struble v. Brewery Employees Welfare Trust Fund, 732 F.2d 325 (1984).

The third circuit, in the above mentioned cases, held that before a beneficiary can commence a lawsuit which does not seek to recover on a personal claim, there must be a determination that the trustees have breached their fiduciary duty. In the case at bar, there was never any determination that the trustees breached their fiduciary duty.

Therefore, there is no conflict between the circuits.

POINT III

There is no conflict between the second circuit's decision below and Congressional policy.

While Congress, intended that "a fiduciary" should have standing to sue to recover delinquent contributions, in the case at bar, there has been no determination that contributions were actually due and owing. In fact, the District Court found that no contributions were owing.

Additionally, there is no conflict between Taft-Hartley and ERISA. Taft-Hartley only requires arbitration when a deadlock (tie-vote)

occurs between the trustees. Once it is determined that there are contributions owing, the trustees would commence an action under the provisions of ERISA. Taft-Hartley imposes absolutely no restrictions on an individual bringing suit for benefits due to him personally.

Therefore, no conflict exists between Congressional policy and the second circuit's decision.

POINT I

NO CONFLICT BETWEEN THE CIRCUITS EXISTS WITH RESPECT TO THE STANDING OF THE UNION-APPOINTED TRUSTEES SO THERE IS NO GROUND FOR REVIEW BY THE SUPREME COURT

Petitioners assert that a conflict between the circuits was created by the Second Circuit's decision below. Petitioners assert that both the Third and Ninth Circuits in Barrowclough vs. Kidder, Peabody & Co., Inc., 752 F2d 924 (3d cir. 1985) and, Amaro vs. Continental Can Co., 724 F.2d 747 (9th Cir. 1984) have found contrary to the Second Circuit. However, both Barrowclough, supra and Amaro, supra are inapposite, as they deal with very different factual situations. Therefore, there is no contradiction between the circuits.

The facts in Barrowclough, supra, are as follows: the suit was

commenced by William Barrowclough, individually for benefits which he believed were due him personally and for an accounting. Barrowclough brought suit against Kidder, Peabody & Co., Inc., his employer, for benefits due pursuant to an Incorporated Deferred Compensation Plan. Since this is a deferred compensation plan, it is only governed by Sections I and V of ERISA. The plan is specifically excluded from Sections III and IV of ERISA. Additionally, since this plan was set up independently, and not with a labor organization, it was not subject to the further restrictions of 29 U.S.C.§183(c)(5)(B) of the Labor-Management Relations Act.

Therefore, essentially Barrowclough is dealing with a situation where an individual is bringing suit

against a non-Taft-Hartley deferred compensation plan.

29 U.S.C. §186, sets up very specific requirements for pension funds where there is a labor organization involved. 29 U.S.C. §186, in general provides that,

> "It should be unlawful for any employer or association of employers...to pay, lend, or deliver, or to agree to pay, lend, or deliver,any money or other thing of value..."

to any employee (other than their normal compensation), representative of employees, or to any labor organization.

29 U.S.C. §186(c), then carves out an exception, to that general restriction. However, there are very explicit requirements entailed in this exception.

The requirement that we are concerned with in this instance is, 29 U.S.C. §186(c)(5)(B), which provides,

> "the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with neutral persons as the reprsentatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office..."

Since, the funds involved here are between a labor organization and an

employer association, they must comply with 29 U.S.C. §186(c). Therefore,

> "[t]he arbitration provision of such trust agreement is, in turn, mandated by Section 302(c)(5)(B) of the Labor Management Relations Act of 1947 ("LMRA"); 29 U.S.C. §186(c)(5)(B) which requires that an agreement of this kind provide for arbitration in matters of administration." (emphasis supplied) Botto vs. Friedberg, 368 F.Supp. 1253 (E.D.N.Y. 1982)

In fact, Article VIII of the subject trust agreements specifically provide for arbitration in accordance with 29 U.S.C. §186(c)(5)(B).

There has been no dispute, that a "deadlock" within the meaning of the statute did occur. After reviewing the evidence presented by the union-appointed trustees, in support of commencing an action against a number of

employers, the employer-appointed trustees disagreed and decided that it would be improper to commence a lawsuit at that time. Therefore, there was a tie-vote as to whether or not to commence an action. As the Court has held in, Enix vs. Burrell, 572 F. Supp. 1364, 1368 (S.D. Ohio 1983),

> "'deadlock', as used in the statute, can be given the latter meaning alluded to in Ader.[An even division of the directors of a corporation in voting.] ...Moreover, all the published decisions concerning §186(c)(5)(B), some of which are cited elsewhere in this opinion, implicitly adopted the 'tie-vote' construction of deadlock."

In addition, there has been no question raised as to whether this dispute was a matter related to the day to day administration of the trust fund. Since the trustees are given the power in the declarations of trust to

> "take any action necessary to enforce payment of the contributions due hereunder, including, but not limited to, proceedings at law and in equity." Article V, Section 4.,

the question whether or not to commence a lawsuit is "left open to the discretion of the trustees by the terms of the trust agreement." Enix, supra at 1369, citing, Ader vs. Hughes, 570 F.2d 303 (10th cir. 1978). Therefore "[i]t is not the type of "extraordinary" matter which should be left to collective bargaining. Enix, id.

Therefore, there is no conflict between the third circuit in Barrowclough, supra and the second circuit in the decision below. Barrowclough, supra, did not deal with a fund which was set up under the requirements of 29 U.S.C.

§186(c)(5)(B). Therefore, there was no statutory requirement to arbitrate the dispute in Barrowclough. However, in the cases for which the writ of certiorari is sought, not only was arbitration mandated by 29 U.S.C. §186(c)(5)(B), but also by the Declaration of Trust for the Funds.

Amaro, supra, also deals with a different fact pattern than the case at bar. In, Amaro, supra, as in Barrowclough, supra, the action was commenced by employees of the defendant, who were participants of the plan. Consequently, the holding which comes out of Amaro, supra, relates specifically to a participant or beneficiary of an ERISA plan, bringing suit for a claim personal to the participant.

> "We conclude that a 'participant' or a

> 'beneficiary' within the meaning of section 3 of ERISA, 29 U.S.C.§1002(7) and (8), is not required to exhaust grievance or arbitration procedures prior to bringing an action under section 510 of ERISA." Amaro, supra at 752.

The trust documents at issue impose no restriction on beneficiaries or participants bringing suit. The only limitation is that imposed by ERISA itself in 29 U.S.C. §1132, on the types of suits which a participant or beneficiary may bring.

Additionally, and most importantly, the second circuit did not find that plaintiff JONES had to arbitrate before bringing suit, on a personal claim, if he had one. The court held that JONES did not bring one of the types of actions enumerated in 29 U.S.C. §1132(a), and therefore he did not have standing individually. Too, he

did not have standing to bring suit derivatively since he did not prove that the trustees had breached their fiduciary duty.

In both Barrowclough, supra, and Amaro, supra, we have decisions by the third and ninth circuits dealing with an individual beneficiary's right to bring suit, for a personal claim, without first arbitrating a claim. While, these two cases affirm a participant's right to bring suit, they have no bearing on the situation at hand. The second circuit's decision below, in, Alfarone et. al. vs Bernie Wolff Construction Corp., et. al., merely stated that, with respect to the trustees, they were governed by the trust documents, as required by 29 U.S.C. §1132(a), and by 29 U.S.C. §186(c)(5)(B) and that,

> "[p]laintiffs' [union - appointed trustees] filing of this suit without ever receiving the approval of a majority of the trustees or employing the arbitration procedure contravenes both the Taft-Hartley Act and the trust agreements. 29 U.S.C. §186(c)(5); see Rosenthal, 571 F. Supp. at 1232." (App. A7a).

Therefore, there is no conflict between the circuits on this issue.

Petitioners also cite to another line of decisions, which the second circuit's decision allegedly contradicts. All of these cases, McKinney vs. Missouri-Kansas-Texas Co., 357 U.S. 265(1958); U.S. Bulk Carriers vs. Arguelles, 400 U.S. 351 (1971); Alexander vs. Gardner-Denver Co., 415 U.S. 36 (1974); Barrentine vs. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) and, McDonald vs. City of West Branch, 466 U.S. 284 (1984) deal with an individual's right to bring

suit, rather than arbitrate a claim. They therefore, create no conflict with the Second Circuit's decision below with respect to trustees standing to sue.

The petitioners then cite to the case of, Central States Pension Fund vs. Central Transport, ____U.S.____, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) to show that the Supreme Court's holding that trustees have a fiduciary responsibility to collect delinquent contributions promptly, was contradicted by the Second Circuit. However, as the Second Circuit states, there was never any conclusion among the trustees as to whether there were delinquent contributions to collect.

> "The trustees of the Funds are evenly divided on whether there is any delinquency in contributions due Local 1974 and whether suit against the employers is justified...".
>
> (Emphasis supplied)
> (App. A 6a)

Therefore, the second circuit did not contradict the Supreme Court with respect to the collection of delinquent contributions, because it was never determined that there were delinquent contributions. This is precisely the issue which an impartial arbitrator would have decided. Judge Nickerson found that there were no contributions owing to the Trustees. This decison was affirmed by the Second Circuit Court of Appeals.

Lastly, petitioners cite to the Supreme Court's decision in, Schneider Moving & Storage Co., vs. Robbins, 466 U.S. 364,104 S.Ct. 1844, 1849 (1984), where the Court held that

> "We conclude, therefore, that the presumption of arbitrability is not a proper rule of construction in determining whether arbitration agreements between the union and the

> employer apply to disputes between trustees and employers..."

The petitioners again state that the Second Circuit contradicted the Supreme Court's decision in the above case. However, that is not the case.

The Supreme Court only resorted to the "presumption of arbitrability" in Schneider, supra, because there was a dispute between the trustees and an employer and no arbitration agreement between the two parties. In the case at bar, the dispute is between the union-appointed trustees and the employer-appointed trustees and there is an arbitration agreement which governs the trustees in this specific situation. It is found in Article VIII of the Declarations of Trust, as required by 29 U.S.C.§186(c)(5)(B). Therefore, there was no need for the

second circuit to rely on a "presumption of arbitrability" in their decision. Therefore, there is no contradiction between the second circuit's decision below and the Supreme Court's decision in Schneider, supra.

Therefore, there is no conflict between the circuits with respect to a union-appointed trustee's right to sue. So there is no ground for review by the Supreme Court.

The Petitioner alleges certain matters, at page 8, footnote 5, as to attempts to obtain, or force the employer-trustees to consent to arbitration, in manners other than as agreed to in the Declaration of Trust. Whilte the allegations are strongly objected to as to their factual accuracy, the allegations are irrelevant, in that they are all post

decisional occurrences, which were not relied upon the Courts in their considerations.

POINT II

NO CONFLICT BETWEEN THE CIRCUITS EXIST WITH RESPECT TO THE STANDING OF A PARTICIPANT OR BENEFICIARY TO SUE INDIVIDUALLY SO THERE IS NO GROUND FOR REVIEW BY THE SUPREME COURT

Petitioners allege that the second circuit's decision regarding DANIEL JONE'S right to sue, is in conflict with the decision of the third circuit in, Nedd vs. United Mine Workers, 556 F.2d 190 (1977) and Struble vs. Brewery Employees Welfare Trust Fund, 732 F2d 325 (1984).

The third circuit in both Nedd, supra and Struble, held

> "If the trustee does not committ a breach of trust in failing or declining to bring an action against the third person, the beneficiaries cannot maintaina suit against the trustee...If it is prudent underthe circumstances to refrain from bringing an

> action, so that the trustee does not violate his duty in so refraining, the beneficiaries cannot compel him to bring the action, nor can they themselves maintain a suit in equity against the third person... We find direct support for our conclusion in an earlier holding of this court. In Nedd, supra..." (emphasis supplied) Struble, supra at 337.

Therefore, before a beneficiary can commence a lawsuit, there must be a determination that the trustees have breached their fiduciary duty. If the trustees have not breached their fiduciary duty, a beneficiary cannot compel them to bring suit.

In the decision of the second circuit, below, the court held,

> "[f]inally, as to Jones' derivative action on behalf of the Funds, such an action can only be brought if the plaintiff first establishes that the trustees breached their fiduciary duty. See Struble, 732 F.2d at 336.

> Jones has failed to establish that the employer-appointed trustees breached their fiduciary duty; their refusal to file a suit to recover contributions allegedly due does not constitute such a breach. See, Ironworkers Local No. 272 vs. Bowen, 695, F2d 531 (11th Cir. 1983)." (App. A9a)

Therefore, it is patently clear that the second circuit, not only did not contradict the third circuit's decision in Struble, supra and Nedd, supra, but relied on the holdings in those cases for its decision. So, there is no conflict between the circuits and therefore no grounds for review by the Supreme Court.

POINT III

NO CONFLICT EXISTS BETWEEN CONGRESSIONAL POLICY AND THE HOLDING OF THE SECOND CIRCUIT SO THERE IS NO GROUND FOR REVIEW BY THE SUPREME COURT

As we stated earlier, in point I, we do not disagree that if it is determined that employers owe contributions to the Funds, suit should be brought to collect on those delinquent contributions. However, in the present case, the trustees never got to the point where there was a determination that contributions were due to the Funds. This is the exact issue on which the Trustees deadlocked.

Also, as stated earlier, there is no conflict between 29 U.S.C. §186(c) (setting forth procedures for administration of the Fund) and 29 U.S.C. §1101, et. seq. (providing for

suit by a fiduciary). 29 U.S.C. §186(C) and the ERISA provisions are two steps in the same procedure. First, you have discussion among the trustees, as to whether an employer is delinquent in making contributions. If a majority of the trustees vote that an employer is delinquent, then they can commence a suit under the ERISA provisions. However, if the trustees deadlock on the delinquency question, an impartial arbitrator has to make that decision. If the arbitrator decides that suit should be brought, the trustees would then bring suit under the ERISA provisions. If the arbitrator decides that there is serious doubt as to whether the employer is delinquent, then there would be no lawsuit. In this manner, the Fund is prevented from wasting their assets on frivolous lawsuits where no contributions are due.

As petitioners continue to repeat,"

> [i]n short, Congress intended that 'a fiduciary' should have standing to sue to enforce §515 and to recover delinquent contributions owed the Trust Fund." (emphasis supplied) (Petitioners brief, p. 14).

We agree that "a fiduciary" does have standing to sue when it has been determined that there are in fact, delinquent contributions. Indeed, the second circuit specifically dealt with any alleged discrepancy between Taft-Hartley and ERISA, with respect to suit by a fiduciary,

> "The limitation in the trust agreement on the powers and duties of less than a majority of the trustees under the instant plans is consistent with the power granted fiduciaries to bring a civil suit under ERISA. ERISA expressly

> requires that the acts of trustees be in acordance with the trust agreements, 29 U.S.C. §1104(a)(1), and expressly contemplates joint administration of trust funds. 29 U.S.C. §1102(a)(1). ERISA does not abrogate the equal representation mandates of the Taft-Hartley Act. 29 U.S.C. §1144(d)." (App A 8a).

Therefore, there is no conflict between Congressional policy and the second circuit's decision with respect to the standing of a trustee to commence a lawsuit.

Petitioners also repeat their assertion that the Court of Appeals undercuts Congressional intent by holding that trustees must always arbitrate before bringing a suit to enforce §515 of ERISA. We reiterate, that this is not the holding of the Court of Appeals, nor the requirements of the Declarations of Trust or 29

U.S.C. §186(c)(5)(B). The Declarations of Trust only require arbitration when there is a "deadlock" between the trustees, pursuant to 29 U.S.C. §186(c)(5)(B). This arbitration would not, as petitioners assert, relieve the trustees of their obligation to collect delinquent contributions. It would merely determine if, pursuant to the Collective Bargaining Agreement and Declaration of Trust, the employer was required to contribute to the Funds, in that particular instance. If the arbitrator determined that the employer was required to contribute to the Fund, the Trustees would be required to commence a lawsuit to collect the delinquent contributions. If at that point they refused to commence an action, the Trustees would be breaching their fiduciary duty and no arbitrator

could arbitrate that question of breach. It would absolutely be a question for the Courts. Therefore, petitioners footnote to Struble, supra, in their brief (Petitioner's brief, p. 14, n.8) is misapplied, because there could be no breach of fiduciary duty until the arbitator determined that an employer owed contributions to the Fund and the trustees refused to commence an action. There is no conflict between Congressional policy and the second circuit's decision.

Petitioners then assert that despite the findings by the second circuit that arbitration was required pursuant to 29 U.S.C. §186(c)(5)(B); that no arbitration should be required in this case, because this was not a matter which involved "the day to day administration" of the Fund. For this

proposition, petitioner cites to the line of cases ending in, Schneider Moving & Storage, Co. v. Robbins, 466 U.S. 364 (1984).

The Supreme Court in Schneider held that,

> "neither the trust agreements nor the Collective Bargaining Agreements at issue have evidenced any intent to condition the contractual right of the trustees to seek judicial enforcement of the trust provisions on exhaustion of the arbitration procedures contained in petitioner's Collective Bargaining Agreements." 104 S. Ct. 1844, 1851 -1852 (1984).

Therefore, the Court never got to the issue of whether or not that dispute was a matter of "day to day administration" because they found that the trustees were not bound by any arbitration provision.

Additionally, the District Court in Enix v. Burrell, supra, gives a very clear distinction between "day to day administration" and "extraordinary matters". Two conditions that should be met for a matter to be considered "day to day administration" (and therefore within the purview of 29 U.S.C. §186(c)(5)(B)) are: 1) it should be a matter left to the discretion of the trustees in the trust agreement; and 2) it is not a matter governed by the Collective Bargaining Agreement and/or Collective Bargaining process. Clearly, the determination as to whether an employer is delinquent and the method of collecting the delinquency is specifically left to the trustees in the Declarations of Trust. Additionally, these matters are not matters which can be determined by the Collective

Bargaining Agreement and/or the Collective Bargaining process.

Therefore, the issue of whether an employee owes contributions is a matter of "day to day administration "of the trust fund and therefore subject to the arbitration provisions of 29 U.S.C. §186(c)(5)(B).

In the remainder, of petitioner's brief (petitioners brief, p. 15-20) he reiterates arguments addressed previously in this brief, see points I and II. Therefore, we will not burden the Court with a reiteration of our arguments at this point.

CONCLUSION

FOR THESE REASONS SET FORTH ABOVE, A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT COURT OF APPEALS.

Respectfully submitted,
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